

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DARRYL WILLINGHAM,

No. C 11-05391 YGR (PR)

Plaintiff,

**ORDER TO SHOW CAUSE REGARDING  
EXHAUSTION; AND DENYING  
PLAINTIFF'S PENDING MOTIONS FOR  
PRELIMINARY INJUNCTIONS**

vs.

O. POUNCE, et al.,

(Docket nos. 8, 15, 17)

Defendants.

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Plaintiff, a state prisoner currently incarcerated at Mule Creek State Prison, filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983, alleging that Defendants violated his constitutional rights while he was incarcerated at San Quentin State Prison ("SQSP") from 2010 through February 2, 2012, the date he filed this action. Plaintiff has also filed motions for a preliminary injunction.

For the reasons explained below, the Court issues an order to Plaintiff to show cause why the case should not be dismissed for failure to exhaust his administrative remedies prior to filing this action. The Court also denies Plaintiff's pending motions for preliminary injunctions.

**DISCUSSION**

**I. Order to Show Cause**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) provides: "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until

1 such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is  
2 mandatory and not left to the discretion of the district court. *Woodford v. Ngo*, 548 U.S. 81, 84  
3 (2006). Exhaustion is a prerequisite to all prisoner lawsuits concerning prison life, whether such  
4 actions involve general conditions or particular episodes, whether they allege excessive force or  
5 some other wrong, and even if they seek relief not available in grievance proceedings, such as  
6 money damages. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The exhaustion requirement requires  
7 "proper exhaustion" of all available administrative remedies. *Ngo*, 548 U.S. at 93.

8 Because exhaustion under Section 1997e(a) is an affirmative defense, a complaint may be  
9 dismissed for failure to exhaust only if failure to exhaust is obvious from the face of the complaint  
10 and/or any attached exhibits. *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). The Court  
11 may dismiss a complaint for failure to exhaust where the prisoner "conce[des] to nonexhaustion" and  
12 "no exception to exhaustion applies." *Id.* at 1120. Here, it is obvious from the face of the complaint  
13 that Plaintiff did not exhaust his administrative remedies as to some of his claims and no exception  
14 to exhaustion is alleged or apparent in the complaint.

15 In Plaintiff's complaint, he concedes that he did not present some of his claims for review  
16 through the SQSP's grievance procedure. Initially, he states that he presented the facts in his  
17 complaint for review through the grievance procedure. (Compl. at 1.) However, when asked to "list  
18 the appeal number and the result of the appeal at each level of review," he alleges that "in each claim  
19 described -- got no response unless otherwise noted-stated." (*Id.* at 2.)

20 Accordingly, the Court issues an order to Plaintiff to show cause as to why this case should  
21 not be dismissed for failure to exhaust his administrative remedies prior to filing this action.  
22 Plaintiff shall file a response to the order to show cause no later than **twenty-eight (28) days** from  
23 the date this Order is filed. The Court notes if Plaintiff has not fully exhausted his administrative  
24 remedies as to all the claims in his complaint prior to filing this action, the complaint will be  
25 dismissed without prejudice.

## 26 **II. Motions for Preliminary Injunction**

27 Plaintiff's motions for a preliminary injunction (Docket Nos. 8, 15, 17) are DENIED for  
28 failure to satisfying the notice requirements of Federal Rule of Civil Procedure 65. Prior to granting

1 a preliminary injunction, notice to the adverse party is required. Fed. R. Civ. P. 65(a)(1). A motion  
 2 for preliminary injunction therefore cannot be decided until the parties to the action are served, and  
 3 they have not yet been served here. *See Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983). A  
 4 temporary restraining order may be granted without written or oral notice to the adverse party or that  
 5 party's attorney if: (1) it clearly appears from specific facts shown by affidavit or by the verified  
 6 complaint that immediate and irreparable injury, loss or damage will result to the applicant before  
 7 the adverse party or the party's attorney can be heard in opposition, and (2) the applicant's attorney  
 8 (Plaintiff himself in this case, as he proceeds *pro se*) certifies in writing the efforts, if any, which  
 9 have been made to give notice and the reasons supporting the claim that notice should not be  
 10 required. Fed. R. Civ. P. 65(b). Plaintiff has not satisfied both requirements.

### 11 CONCLUSION

12 For the reasons outlined above, the Court orders as follows:

13 1. Plaintiff is ordered to show cause why this case should not be dismissed for failure to  
 14 exhaust his administrative remedies as to all the claims in his complaint prior to filing this action.  
 15 Plaintiff shall file a written response to the order to show cause no later than **twenty-eight (28) days**  
 16 from the date this Order is filed. **Failure to comply with this order within the deadline provided**  
 17 **will result in the dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).**


18 2. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
 19 informed of any change of address and must comply with the Court's orders in a timely fashion.  
 20 Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se* whose address changes  
 21 while an action is pending must promptly file a notice of change of address specifying the new  
 22 address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail  
 23 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and  
 24 (2) the Court fails to receive within sixty days of this return a written communication from the *pro*  
 25 *se* party indicating a current address. *See* L.R. 3-11(b).

26 3. Extensions of time are not favored, though reasonable extensions will be granted.  
 27 Any motion for an extension of time must be filed no later than **fourteen (14) days** prior to the  
 28 deadline sought to be extended.

1           4.       This Order terminates Docket Nos. 8, 15 and 17.

2           IT IS SO ORDERED.

3   DATED: September 25, 2012

  
YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE